Supreme Court, U.S.
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No. 94-807

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARIA PIROGLU,
Petitioner,

v.

T.R. COLEMAN, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

T.R. Coleman, who was sued in his official and individual capacities has been replaced as fire chief of the District of Columbia by Otis J. Latin, Sr.

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STATUTES

Fourth Amendment, United States Constitution . . . *passim*

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Petitioner, Maria Piroglu, a former District of Columbia probationary employee, was discharged forty-six days after being hired as an ambulance attendant because a urine test administered to her was positive for cocaine use. The mandatory urine test was part of the initial training program for probationary Emergency Medical Technicians ("EMTs").[1/]

[1/] EMTs are fire department personnel who travel by ambulance in response to calls for emergency medical care. Their functions include making preliminary assessments of patient symptoms; providing cardiopulmonary resuscitation and other basic life support services; giving initial medical care; and transporting patients to medical facilities. *See District of Columbia v. Howard*, 588 A.2d 683 (D.C. 1991); *Hines v. District of Columbia*, 580 A.2d 133 (D.C. 1990).

Ms. Piroglu claims that the District of Columbia violated her Fourth Amendment right to be free of unreasonable searches because, although all members of the training class had been tested and all had been warned that testing would occur, the fire department had promulgated no regulations governing drug testing of probationary employees.

Ms. Piroglu was an EMT trainee during July and August 1986. After being hired by the District of Columbia on July 7, she was enrolled in a four-week training course. J.A. 9, 17.[2/] As part of the hiring process, Ms. Piroglu's urine had been tested before her appointment as a probationary EMT. J.A. 59.

During the training course, she and her classmates were informed that they would be tested for illegal drug use. J.A. 47. At the time, all EMT trainees were being tested for illegal drug use before graduation from the training academy. J.A. 47, 72. The testing was a mandatory component of the initial screening of EMT candidates. J.A. 72.

On August 1 the chief training instructor informed the training class (including Ms. Piroglu) that they would be tested that day for illegal drug use. J.A. 47-48, 61. The trainees were taken as a group to the Police and Fire Clinic, where they provided urine samples. J.A. 48.

Ms. Piroglu produced a urine sample in the presence of a female police sergeant. J.A. 58. There is an unresolved factual dispute whether the sergeant watched Ms. Piroglu urinate into the sample bottle. J.A. 108. What is clear is that the sergeant suspected possible tampering, apparently because the sample felt cold. J.A. 38. She informed the chief training instructor who directed her to obtain another urine sample from Ms. Piroglu. J.A. 109. Ms. Piroglu provided the sec-

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[2/] "J.A." refers to the joint appendix prepared for the court of appeals.

ond sample while the sergeant and another female officer watched. *Id.*

Laboratory examinations of the second urine sample yielded positive results for cocaine use. J.A. 59.

On August 22, the fire chief, the EMTs' highest level supervisor, notified Ms. Piroglu in writing that she would be fired that day for failure to complete her one-year probationary period satisfactorily. J.A. 63.

2. Ms. Piroglu brought suit in federal district court against the fire chief, the lead training instructor, the two test observers, and the District of Columbia, claiming violations of the Fourth and Fifth Amendments. J.A. 21-28. The Fifth Amendment claim is not at issue in this Court.

On cross-motions for summary judgment, the district court entered judgment for the defendants. A. 32A-41A.[3/] Relying on *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the court held that compulsory urinalysis of government employees is constitutional when their jobs affect public safety or present opportunities for compromise of official integrity. A. 34A-35A. The court concluded that both concerns are implicated in ambulance attendant positions. A. 35A. The court also concluded that intervening circuit law, holding that visual observation of the act of urination is unreasonably intrusive, should not be applied retroactively. A. 38A-40A. If the circuit precedent were applicable, Ms. Piroglu might be entitled to damages for invasion of privacy, a remedy she had not sought, but would not be entitled to reinstatement. A. 40A.

3. The court of appeals affirmed the holding that giving the urine test to EMT trainees did not violate the Fourth Amendment but remanded for factual development to deter-

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[3/] "A." refers to the appendix to the petition for certiorari.

mine whether the administration of the test to Ms. Piroglu had been unduly intrusive. A. 15A-24A.

a. The court held that the District of Columbia had a strong governmental interest in testing probationary EMTs for drug use. Without warrantless drug testing, a trainee drug-user could complete the training program, become an EMT, and present "a significant danger to the public safety" in life-threatening situations. A. 17A-18A. In contrast to the government's interest, the invasion of privacy had been relatively slight: Ms. Piroglu (together with other members of the class) had been warned that a drug test would be administered and a medical examination, including drug testing, had been part of the training program. A. 19A.

The court of appeals rejected the contention that, under *Skinner*, drug tests are unreasonable searches unless authorized by regulations. The court read *Skinner* as holding that the regulations decrease the expectation of privacy, not that they are a *sine qua non* to constitutional drug testing. A. 21A. Here, a regulation would not have provided Ms. Piroglu more notice than she had been given. A. 22A. In addition, the testing had been universal, in accordance with past practice. A. 22A-23A & n. 3.

The court also held that, given the uniform practice of testing all EMT trainees and the notice that the trainees had received, regulations would have provided Ms. Piroglu no additional protection, at least none that is constitutionally required. A. 22A-23A.

b. The court of appeals could not determine from the record on summary judgment whether Ms. Piroglu had been watched by the attending sergeant during urination of the first sample; if she had been, that would be an undue invasion of privacy under circuit precedent.[4/] A. 9A-10A. The court

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[4/] *National Treasury Employees Union v. Yeutter*, 287 U.S. App. D.C. 28,

(continued...)

remanded for factual development. A. 10A. For the same reason, the court of appeals could also not determine, from the existing record, whether direct observation by two employees during the second urination was reasonable. A. 13A. It remanded that question to the district court as well. *Id.*

The court wrote that if, on remand, the district court were to find that Ms. Piroglu had been watched without reasonable suspicion of test tampering, the scrutiny would have been unreasonable. Ms. Piroglu would not be entitled to reinstatement and backpay because the first sample had not been tested and had not led to termination, but she would be entitled to damages for the invasion of privacy. A. 13A-15A. The presence of an additional observer during the second urination also would not entitle Ms. Piroglu to reinstatement or backpay because the method of observation had not caused the firing: "The District terminated Piroglu's employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process." A. 14A-15A, *citing Carey v. Piphus*, 435 U.S. 247 (1978), and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

REASONS FOR DENYING THE WRIT

There is no need for further review of either question presented by the petition.

The court of appeals' holding--that regulations are not essential before drug tests can constitutionally be administered to probationary trainees if all trainees are tested and all have been notified that testing would be conducted during their training--conflicts with no holding by this Court or by any

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[4/] (...continued)

918 F.2d 968 (1990).

federal or state appellate court. It presents no issue of constitutional magnitude necessitating this Court's attention.

The court of appeals' direction to the trial court that, if either administration of the urine test was unnecessarily intrusive, Ms. Piroglu would be entitled to damages but not to reinstatement or backpay, remains contingent on the district court's factual findings on remand. It is consistent with this Court's holdings that a remedy should be tailored to the constitutional violation.

As a matter of logic, we discuss violation before remedy, the reverse order in which the questions are presented in the petition.

1. The Fourth Amendment is a shield only against *un*reasonable searches and seizures. Under *Skinner* and *Von Raab,* drug testing is not unreasonable if the risk to society of having employees--much less probationary trainees--perform their functions under the influence of drugs outweighs the intrusion into the employees' reasonable expectations of privacy. The governmental interest in testing is compelling when employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. The petition does not argue that the District of Columbia's interest in testing probationary EMTs, whose duties often make the difference between life and death, is less than compelling.

The Court has never held that a drug test (or other random search) is unreasonable simply because the government has not issued regulations governing testing. Rather, the Court has held that "[w]hat is reasonable * * * 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Id.*, at 619, *quoting United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

While *Skinner* and *Von Raab* involved testing based on legislation or written directives, the Court's focus was not on the legislation or directives as such but on the extent to which

the tests in fact intruded on employee privacy. The Court concluded that drug tests are not unreasonable searches when the testing is "well known to the covered employees" and the testing is "automatic" for all applicants to a covered position; under those circumstances there are few discretionary decisions to be made by rank-and-file personnel. *Von Raab*, 489 U.S. at 667; *Skinner*, 489 U.S. at 622; *see also, United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976)(holding routine police checkpoints to be constitutional despite apparent absence of governing regulations, in part because supervisory personnel choosing checkpoint locations were unlikely to act "arbitrarily or oppressively").

The reason for limiting rank-and-file discretion is to prevent arbitrary action and to give fair warning of a diminished expectation of privacy. A drug-testing program is not unreasonable when all members of a class of employees are tested, so that no individual member of the class is subject to discriminatory treatment, and when all have been notified in advance that they will be tested. *See Von Raab*, 489 U.S. at 672 n. 2 (noting unlikeliness of arbitrary and oppressive interference with privacy when a testing program applies to a clearly defined group of employees who receive advance notice that they will be tested). A testing program that limits discretion as to whom to test, what test is to be given, and, in a general way, when testing will occur--all matters made known to the prospective test-takers--is not unreasonable simply because it has not been dictated by written guidelines.

In the present case, the discretion of rank-and-file personnel was substantially bridled. The record discloses, and the court of appeals held, that all of the trainee class had been given early notice and all members of the class had been tested (as had been all members of previous trainee classes). Regulations would not have yielded more notice or provided greater protection against discriminatory treatment. To be sure, some discretion was exercised (by supervisory person-

nel, it should be noted) as to when the test would be given during the training period but the Court has recognized that testing programs that allow supervisors to exercise some judgment do not thereby permit "unbridled discretion." *Skinner*, 489 U.S. at 622 n. 6.

There is no need for further review of the second question presented by the petition for review.

2. The petition's other challenge--to the court of appeals' holding that remedy must be tailored to violation--also does not warrant this Court's attention.

Remedy is, of course, contingent on a finding of liability; in the present case there is no such finding and there may never be one. On remand, the district court may find that Ms. Piroglu had not been watched when she urinated the first time and that having two observers--one a corroborating witness--for the second test was not unreasonable. If so, there will be no remedy because there has been no constitutional violation.

This Court generally refuses to review decisions that are contingent on the outcome of further proceedings in the lower courts. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR. Co.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 61 U.S.L.W. 3787 (1993)(Scalia, J., concurring).

In any event, the court of appeals' direction to the district court concerning remedy is consistent with this Court's jurisprudence. Remedy must be commensurate with the constitutional violation. *Memphis Community School District v. Stachura*, 477 U.S. 299, 306-307 (1986)(damages are "*compensatory*," in the sense that they are based on plaintiff's "actual losses"; italics in original); *id.* at 315 ("award must be proportional to the actual loss sustained")(Marshall, J., concurring). In addition, in order to receive damages at all, a plaintiff must first prove that there is a causal relationship between the constitutional violation and actual, compensable injury. *Carey v.*

Piphus, 435 U.S. at 260; *see also, Bivens v. Six Unknown Named Agents, supra*, 403 U.S. at 395-397 (plaintiff is entitled to recover for injuries suffered "as a result" of the Fourth Amendment violation). Causation is ordinarily determined according to common law tort principles. *Stachura*, 477 U.S. at 306.

Here, there is no causal relationship between the actions of the alleged attending witnesses and Ms. Piroglu's discharge. The urine testing program was constitutional for reasons stated in section 1, above. The first urine sample provided by Ms. Piroglu was suspect and therefore not used. It was cold to the touch, whether or not the police sergeant watched the act of urination. Because there was a reasonable suspicion that the test had been tampered with, Ms. Piroglu was required to provide a second sample, this time under direct observation by two witnesses. Even if the second observer's presence were to be deemed excessive by the trial court, her attendance had no bearing on the result of the second test. The sample would not have been different had the second witness been absent. In other words, neither the first direct observation--if it occurred--nor the presence of the second witness was a proximate, or even a "but for," cause of the discharge. The observations, while perhaps unreasonable, were entirely separable from the test; they did not cause the test to be administered a second time and did not result in the discovery of the incriminating evidence. *Cf. Murray v. United States*, 487 U.S. 533 (1988)(in criminal cases, evidence acquired through illegal searches need not be suppressed when also obtained from legal "independent sources"). In short, while the witnesses' scrutiny could possibly justify an award of damages against the District of Columbia for *their* excessive invasions of privacy, their actions did not contribute to, much less cause, the discharge.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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